IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.1366/2005

Reserved on.16.8.2007

Decided on.22.8.2007

Sidh Shri Baba Balak Nath Mandir Sabha. …Petitioner.

Versus

Pyare Chand. …Respondent

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*.yes.*

For the petitioner : Mr. Suneet Goel, Advocate.

For the respondent Mr. Tek Chand Sharma, Advocate.

Rajiv Sharma, J.

A challenge has been laid by the petitioner to the order passed by the H.P. Labour Court, Shimla dated 3.12.2005 in application No.1 of 2002.

The brief facts necessary for the adjudication of the present petition are that the respondent had filed application under section 33-C(2) of the Industrial Disputes Act, 1947 before the H.P. Labour Court, Shimla on 2.1.2002 claiming a sum of Rs. 23,093/-. The petitioner had filed reply to the petition filed by the respondent and had taken a preliminary objection therein that there was no relationship of master and servant since the respondent was engaged as a contractor and not as a workman. The respondent had filed rejoinder to the reply filed by the petitioner. The Labour Court allowed the application filed by the respondent on 3.12.2005

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? yes.

and accordingly the petitioner was directed to pay a sum of Rs. 23,093/- with interests @ 9% till the realization of the amount.

Mr. Sunit Goel, Advocate had primarily taken two pleas, firstly that the Labour Court had no jurisdiction to adjudicate upon the application preferred under section 33-C (2) of the Industrial Disputes Act, 1947 since the amount was not pre-adjudicated upon either by way of award/agreement/settlement and secondly on the ground that respondent was engaged as a contractor and not as a workman.

Mr. Tek Chand Sharma, Advocate had supported the order dated 3.12.2005 passed by the Labour Court.

I have heard the learned counsel for the parties and perused the record.

The respondent had stated in his petition more particularly in paragraphs No.3,4,7 and 10 that he was engaged as a contractor. The petitioner in the reply has also taken a categorical stand that the respondent was in fact engaged as a contractor and not as a workman. The respondent appeared as PW-1 before the Labour Court and stated that he used to engage extra labour himself to carry out the construction work of the temple. He further testified that he exercised the complete supervision and control over the labour and the petitioner had nothing to do with the engagement of labour. It is also admitted by the respondent that he got the work done of the temple on contract in his cross-examination as well. He had admitted that a sum of Rs. 39,500/- had been paid by the petitioner to him. He also stated that his services were terminated by the respondent in his statement. In para 7 of the petition, he had stated that the petitioner had arbitrarily and illegally terminated the contract/services of the respondent without giving any notice and assigning any plausible reason. He had admitted in his cross-examination

that though he was not registered as a contractor, but he was a petty contractor. The petitioner had examined one Sh. Vivek Karol, who had assessed the work of the respondent. It is evident from the Annexures R-1 and R-2 filed by the respondent with his reply that he has signed the documents dated 5.9.2001 and 22.3.2000 as a contractor.

The sole question which requires consideration is whether the respondent could avail the remedy under section 33-C (2) of the Industrial Disputes Act, 1947 without there being any prior adjudication of the dispute either by way of award or settlement. In the present case there was no pre-adjudication of the amount and the same had been claimed by the respondent by filing application before the Presiding Judge, H.P. Labour Court, Shimla under section 33-C (2) of the Industrial Disputes Act, 1947. The petitioner had always disputed the amount payable to the respondent, which necessitated its prior adjudication as per law before the matter could be adjudicated under section 33-C(2) of the Industrial Disputes Act, 1947.

The Hon'ble Supreme Court has held in ***Central Inland Water Transport Corporation Ltd. Vs. The Workmen and another***, AIR 1974 SC 1604 that the proceedings under Section 33-C (2) of the Industrial Disputes Act are in the nature of the execution. Their Lordships of the Hon'ble Supreme Court have held as under:

> **"It is now well-settled that a proceeding under section 33-C (2) is a proceeding, generally, in the nature of an execution proceeding wherein the Labour Court calculates the amount of money due to a workman from his employer, or if the workman is entitled to any benefit which is capable of being computed in term of money, the Labour Court proceeds to compute the benefit in terms of money. This calculation or computation follows upon an existing right to the money or benefit, in view of its being previously adjudged, or, otherwise, duly provided for. In Chief Mining Engineer East India Coal Co. Ltd. V.**

Rameswar, (1968) 1 SCR 140 = (AIR 1968 SC 218) it was reiterated that proceedings under Section 33 C (2) are analogous to execution proceedings and the Labour Court called upon to compute in terms of money the benefit claimed by workmen is in such cases in the position of and executing court. It was also reiterated that the right to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and must arise in the course of and in relation to the relationship between an Industrial workman and his employer."

The Hon'ble Supreme Court has held in ***Municipal Corporation of Delhi Vs. Ganesh Razak and another***, (1995) 1 SCC 235 that without prior adjudication or reorganization of the disputed claim of the workmen to be paid at the same rate as the regular employees, proceedings for computation of the arrears of wages claimed by them on that basis is not maintainable under section 33-C (2) of the industrial Disputes Act, 1947. Their Lordships of the Hon'ble Supreme Court have held as under:

"The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workmen to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under section 33-C (2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power under section 33-C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognized by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under section 33-C (2) like that of the Executive

Court's power to interpret the decree for the purpose of its execution."

The Hon'ble Supreme Court has held in ***State Bank of India v. Ram Chandra Dubey,*** (2001) 1 SCC 73 that the jurisdiction of the Labour Court under Section 33-C (2) extends to computation of a pre-existing benefit or one flowing from a pre-existing right and not to computation of a benefit which is considered just and fair. Their Lordships of the Hon'ble Supreme Court have held as under:

"Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under section 33-C (2) of the Act. The benefit sought to be enforced under section 33-C (2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under section 33-C (2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not granted necessarily gets denied in judicial or quasi judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicial manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in proceeding to whom a reference under section 10 of the Act is made. To state that merely upon reinstatement, a workman would be entitled, under the terms of award, to all his arrears of pay and allowances would be incorrect because

several factors will have to be considered, as stated earlier, to find out whether the workman is entitled to back wages at all and to what extent. Therefore, we are of the view that the High Court ought not to have presumed that the award of the Labour Court for grant of back wages is implied in the relief of reinstatement or that the award of reinstatement itself conferred right for claim of back wages."

The Hon'ble Supreme Court in ***State of U.P. and another V. Brijpal Singh***, (2005) 8 SCC 58 has held as under:

"It is well settled that the workman can proceed under Section 33C(2) only after the Tribunal has adjudicated on a complaint under Section 33A or on a reference under Section 10 that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman. This Court in the case of Punjab Beverages Pvt. Ltd. Vs. Suresh Chand , (1978) 2 SCC 144 held that a proceeding under Section 33C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. Proceeding further, this Court held that the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer. This Court further held as follows:

> **"It is not competent to the Labour Court exercising jurisdiction under Section 33C(2) to arrogate to itself the functions of an industrial tribunal and entertain a claim which is not based on an existing right but which may appropriately be made the subject matter of an industrial dispute in a reference under Section 10 of the Act."**

In the case of Municipal Corporation of Delhi vs. Ganesh Razek & Anr. (1995) 1 SCC 235. this Court held as under:

> **"The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workmen to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under Section 33-C(2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compare the benefit so adjudicated on that basis in exercise of its power under Section 33-C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognised by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity required interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33-C(2) like that of the Executing Court's power to interpret the decree for the purpose of its execution.**
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> **In these matters, the claim of the respondent-workmen who were all daily-rated/casual workers, to be paid wages at the same rate as the regular workers, had not been earlier settled by adjudication or recognition by the employer without which the stage for computation of that benefit could not reach. The workmen's claim of doing the same kind of work and their entitlement to be paid wages at the same rate as the regular workmen on the principle of "equal pay for equal work" being disputed, without an adjudication of their dispute resulting in acceptance of their claim to this effect, there could be no occasion for computation of the benefit on that basis to attract Section 33-C(2). The mere fact that some other workmen are alleged to have made a similar claim by filing writ petitions under Article 32 of the Constitution is indicative of the need for adjudication of the claim of entitlement to the benefit before computation of such a benefit could be sought. Respondents'**

claim is not based on a prior adjudication made in the writ petition filed by some other workmen upholding a similar claim which could be relied on as an adjudication enuring to the benefit of these respondents as well. The writ petitions by some other workmen to which some reference was casually made, particulars of which are not available in these matters, have, therefore, no relevance for the present purpose. It must, therefore, be held that the Labour Court as well as the High Court were in error in treating as maintainable the applications made under Section 33-C(2) of the Act by these respondents."

In the case of State Bank of India vs. Ram Chandra Dubey & Ors. , (2001) 1 SCC 73, this Court held as under:

"When a reference is made to an Industrial Tribunal to adjudicate the question not only as to whether the termination of a workman is justified or not but to grant appropriate relief, it would consist of examination of the question whether the reinstatement should be with full or partial back wages or none. Such a question is one of fact depending upon the evidence to be produced before the Tribunal. If after the termination of the employment, the workman is gainfully employed elsewhere it is one of the factors to be considered in determining whether or not reinstatement should be with full back wages or with continuity of employment. Such questions can be appropriately examined only in a reference. When a reference is made under Section 10 of the Act, all incidental questions arising thereto can be determined by the Tribunal and in this particular case, a specific question has been referred to the Tribunal as to the nature of relief to be granted to the workmen.

The principles enunciated in the decisions referred by either side can be summed up as follows:

“Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under Section 33-C(2) of the Act. The benefit sought to

be enforced under Section 33-C (2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33-C(2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not granted necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made. To state that merely upon reinstatement, a workman would be entitled, under the terms of award, to all his arrears of pay and allowances would be incorrect because several factors will have to be considered, as stated earlier, to find out whether the workman is entitled to back wages at all and to what extent. Therefore, we are of the view that the High Court ought not to have presumed that the award of the Labour Court for grant of back wages is implied in the relief of reinstatement or that the award of reinstatement itself conferred right for claim of back wages"

Thus it is clear from the principle enunciated in the above decisions that the appropriate forum where question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made. Thereafter, the Labour Court, in the instant case, cannot arrogate to itself the functions of an Industrial Tribunal and entertain the claim made by the respondent herein which is not based on an existing right but which may appropriately be made the subject matter of an industrial dispute in a reference under

Section 10 of the I.D. Act. Therefore, the Labour Court has no jurisdiction to adjudicate the claim made by the respondent herein under Section 33C (2) of the I.D. Act in an undetermined claim and until such adjudication is made by the appropriate forum, the respondent-workman cannot ask the Labour Court in an application under Section 33C(2) of the I.D. Act to disregard his dismissal as wrongful and on that basis to compute his wages. It is, therefore, impossible for us to accept the arguments of Mrs. Shymala Pappu that the respondent-workman can file application under Section 33C(2) for determination and payment of wages on the basis that he continues to be in service pursuant to the said order passed by the High Court in Writ Petition No. 15172 of 1987 dated 28.10.1987. The argument by the learned counsel for the workman has no force and is unacceptable. The Labour Court, in our opinion, has erred in allowing the application filed under Section 33C(2) of the I.D. Act and ordering payment of not only the salary but also bonus to the workman although he has not attended the office of the appellants after the stay order obtained by him. The Labour Court has committed a manifest error of law in passing the order in question which was rightly impugned before the High Court and erroneously dismissed by the High Court. The High Court has also equally committed a manifest error in not considering the scope of Section 33C(2) of the I.D. Act. We, therefore, have no hesitation in setting aside the order passed by the Labour Court in Misc. Case No. 11 of 1993 dated 23.8.1995 and the order dated 9.1.2002 passed by the High Court in C.M.W.P. No. 36406 of 1995 as illegal and uncalled for. We do so accordingly.

Since there was no prior adjudication of the amount claimed by the respondent either by way of award or settlement/agreement, the same could not be adjudicated upon by the Labour Court under section 33-C (2) of the Industrial Disputes Act, 1947. The provisions under section 33-C (2) of the Industrial Disputes Act, 1947 are in the nature of execution.

The matter is also required to be viewed from another angle on the basis of second submission made by Mr. Suneet Goel, Advocate. The remedy under the Industrial Disputes Act, 1947 is available to the workman and not to the contractor. The respondent himself has stated in his application that he was a contractor. He had admitted in his examination-in-chief as well as in cross-examination while appearing as PW-1 that he was working as a contractor. Since the respondent was a contractor, he cannot be held to be a workman within the meaning of section 2 (s) of the Industrial Disputes Act, 1947. The workman could not approach the Labour Court directly under section 33-C (2) of the Industrial Disputes Act, 1947 against his alleged termination by the employer. The remedy available to the workman against his retrenchment is to issue a demand notice to the employer and thereafter the conciliation proceedings are to be held by the Conciliation Officer and it is only after the failure report that the reference is made by the State Government to the Labour Court in accordance with law.

The judgment cited by Mr. Tek Chand Sharma, Advocate i.e. Dharangadhra Chemical Works Ltd; Versus State of Saurashtra and others, AIR 1957 SC 264 is distinguishable on the facts. In the present case the respondent had claimed himself to be a contractor and has never stated in the pleadings or his statement that he had agreed to work personally as workman.

The upshot of the above discussion is that the Labour Court had no jurisdiction to entertain and adjudicate upon the application preferred by the respondent under section 33-C (2) of the Industrial Disputes Act. The respondent was a contractor and not a workman and thus could not approach the Labour Court under section 33-C (2) of the Industrial Disputes Act, 1947. Since the respondent had claimed that the

contract/service had been illegally terminated, he should have taken recourse to the remedy provided under the Industrial Disputes Act, 1947 in the manner as discussed hereinabove.

Accordingly this writ petition is allowed. The order passed by the Labour Court on 3.12.2005 is quashed and set aside. The respondent is directed to deposit a sum of Rs. 31,409/- in the Registry of this Court as per the security bond furnished by him dated 12th May, 2006 within a period of four weeks from today. There shall be no order as to costs.

(Rajiv Sharma), Judge

August 22, 2007.
Awasthi